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No. _____

In The

Supreme Court of the United States

October Term, 1995

MANOLO DE LOS SANTOS,

Petitioner,

v.

CAMBRIDGE TANKERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner submits that his application for a Writ of Certiorari to the Supreme Court of California presents the following question for review:

Do the Ninth Circuit Pattern Instructions, especially when applied by the Courts of the State of California, deprive seamen of a remedy against shipowners for unseaworthiness by reason of assignment of too few persons to perform a particular task?

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DECISIONS BELOW

1. The San Francisco Superior Court of the State of California entered judgment on a jury verdict in favor of Respondent Cambridge and against Petitioner De Los Santos on June 1, 1994. (Appendix pages 14-15).

2. The First Appellate District, Division Three of the Court of Appeal of the State of California affirmed the Superior Court judgment by way of its unpublished opinion dated September 27, 1995. (Appendix pages 1-13).

3. The Supreme Court of California denied De Los Santos' Petition for Review on December 20, 1995. (Appendix page 16).

JURISDICTION

Jurisdiction of the state courts was predicated upon the Jones Act 46 U.S.C. §688 and the General Maritime Law. This Court has jurisdiction pursuant to 28 U.S.C. §1257 and is requested to review the decision of the California Supreme Court, the highest court of a State in which a decision could be had, in denying review of the intermediate appellate court's affirmance of judgment in favor of Cambridge at the trial court level.

STATUTES INVOLVED

De Los Santos' Petition raises far reaching questions concerning the interpretation and application of the Jones Act 46 U.S.C. §688 pursuant to this Court's decision of

Waldron v. Moore McCormick Lines, 386 U.S. 724, 727 and fn. 4; 87 S.Ct. 1410, 1412 and fn. 4 (1967), where it concerns the distinction between a well manned ship and a well manned operation aboard the ship as follows:

> In *Mahnich v. Southern S.S. Co.,* 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561, however, the Court made it clear that the availability of safe and sufficient gear on board does not prevent the actual use of defective gear from constituting unseaworthiness, for the test of seaworthiness is to be applied "when and where the work is to be done." Id., at 104, 64 S.Ct. at 459. And in *Crumady v. The Joachim Hendrik Fisser,* 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy. We emphatically stated the basis of our holding: "Unseaworthiness extends not only to the vessel but to the crew." Id., At 417, 79 S.Ct. at 447. For that proposition the Court cited *Boudoin v. Lykes Bros. S.S. Co.,* 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, where we said, "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other." Id. At 339, 75 S.Ct. at 385.
>
> We likewise see no reason to draw that line here. That being so, under *Mahnich* it makes no difference that respondent's vessel was fully manned or that there was a sufficient complement of seamen engaged in the overall docking operations, for there were too few men assigned "when and where" the job of uncoiling the rope

was to be done. And under *Crumady* it makes no difference that the third mate and two men he assigned to perform the job were themselves competent seamen, or that the rope was itself a sound piece of gear. By assigning too few men to uncoil and carry the heavy rope, the mate caused both the men and the rope to be misused.

This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection. If petitioner had been ordered to use a defective pulley in lifting the rope, he would likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not.

STATEMENT OF THE CASE

Manolo De Los Santos was an able-bodied seaman aboard the M/V OVERSEAS BOSTON. On April 14, 1992, he sustained an L5-S1 herniated disc at sea while attempting to singlehandedly remove a C-clamp holding up approximately 20, 4 by 8 foot panels weighing about 1000

lbs. when the clamp came off prematurely and unexpectedly and the panels fell on him and knocked him toward the deck, which he struck with his low back. The OVERSEAS BOSTON was owned and operated by Cambridge and De Los Santos brought suit under the Jones Act for negligence and under the General Maritime Law, for unseaworthiness, on the theory among others, that the assignment of him to perform this job singlehandedly was inadequate, notwithstanding the overall adequacy of the crew as a whole.

There was no legitimate dispute that had another man been assigned to assist De Los Santos in removing the C-Clamp, his accident would not have occurred. Nonetheless, the trial judge refused to instruct the jury in the language of 3 *Devitt, Blackmar and Wolff* §95.11 that:

> "An unseaworthy condition may result from . . . the lack of adequate manpower to perform a particular task on the ship."

Instead, the jury was instructed in the language of the *Manual of Model Civil Jury Instructions for the Ninth Circuit,* 1993 Edition §9.02.02 that:

> "a vessel is seaworthy if . . . it is operated by a crew reasonably adequate and competent for the work assigned.
>
> A vessel is unseaworthy if its crew is not reasonably adequate or competent to perform the work assigned."

The jury found that the OVERSEAS BOSTON was seaworthy on a split 9-3 verdict. In support of his motion for new trial, De Los Santos filed an affidavit from the jury foreperson to the effect, among other things, that the nine jurors (including herself) who voted in favor of

Cambridge on the issue of unseaworthiness would not have done so had they been instructed that "an unseaworthy condition may result from a lack of adequate manpower to perform a particular task on the ship."

The decision of the California intermediate Appellate Court that the California Supreme Court refused to review affirmed the trial court judgment on the basis that " . . . there was a high degree of similarity between. . . . " the *Ninth Circuit Pattern* and the *Devitt and Blackmar* language and that a litigant is not entitled to have a jury instructed in "any particular language." (Appendix page 11). The intermediate decision is contrary to California law as defined by *Soule v. G.M.C.*, 8 Cal.4th 548, 574-583 (1994), as well as the law of most other states as interpreted by the federal courts in *Morrison v. Mahaska Bottling Co.*, 39 F.3d 839, 845 (8th Cir. 1994) that:

> . . . requires that a court give a requested instruction when it states a correct rule of law having application to the case and the concept is not otherwise embodied in the other instruction.

REASONS FOR GRANTING WRIT

For at least the last 20 years, the crews of merchant ships have been decreasing due to automation. The fact that the crew of a vessel may be adequate for her assigned mission does not mean that there are enough people available to perform a particular task.

In the last 10 years, Pattern Jury Instructions drafted on behalf of the Federal Circuits have been increasingly

used in preference to the *Devitt and Blackmar* instructions that have heretofore been the standard.

Only the Fifth and Ninth Circuits have specific language as to the concept of the adequacy of manpower. *The Pattern Jury Instructions, Civil Cases U.S. Fifth Circuit, District Judge's Association* §4.5 *Unseaworthiness* says that:

> "A vessel may be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task."

The Fifth and Ninth Circuits are thereby in conflict with each other by reason of their pattern instructions.

Both the state and federal courts need this Court's guidance on the role of the Pattern Instructions and in particular, on the concept of adequate manpower in the law of unseaworthiness as defined in *Waldron, supra* and as disregarded by the courts below.

ARGUMENT

A. THE STATE COURT DECISIONS BELOW FOLLOW THE NINTH CIRCUIT PATTERN WHICH CONFLICTS WITH THE FIFTH CIRCUIT PATTERN

The adequacy of personnel standard of the Ninth Circuit that was followed by the decisions below fails to distinguish between a "numerically adequate crew" and "too few persons assigned to a given task." The Fifth Circuit Pattern Instructions make this distinction very clear indeed. The State Court decisions below (Appendix ___) find that there is no such distinction and refuse to

follow California law, as defined by *Soule, supra,* by holding that a litigant is not entitled to "particular language" in a jury instruction, even if that language states a concept not otherwise embodied in the other instructions. Therefore, the State Court decisions below follow the Ninth Circuit in taking a position contrary to the Fifth.

B. THE STATE COURT DECISIONS BELOW CONFLICT WITH WALDRON AS TO WHETHER THERE CAN BE UNSEAWORTHINESS DUE TO INSUFFICIENT PERSONNEL EVEN THOUGH THERE WAS A NUMERICALLY ADEQUATE CREW

Waldron, supra, makes it clear, as does the Fifth Circuit Pattern Instruction *supra,* that the concept of unseaworthiness due to insufficient personnel to perform a particular task is entirely separate and apart from the concept of a numerically adequate crew. By refusing to recognize that these two concepts are entirely different (Appendix page 11) the decisions below are in direct conflict with *Waldron.*

CONCLUSION

The writ should be granted to resolve the conflict between circuits and to require the State Courts of California and the Ninth Circuit Pattern Instructions to conform to the settled teachings of this Court.

THOMAS J. BOYLE
Attorney for Petitioner
Manolo De Los Santos

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MANOLO DE LOS SANTOS, Plaintiff and Appellant, v. CAMBRIDGE TANKERS, INC., Defendant and Respondent.	A067154 (San Francisco County Super. Ct. No. 948402) (Filed Sept. 27, 1995)

PROCEDURAL AND FACTUAL BACKGROUND

Appellant Manolo De Los Santos filed an action under the Jones Act, 46 United States Code section 688 et seq., and the doctrine of unseaworthiness under general maritime law, against his employer respondent Cambridge Tankers, Inc., the owner of the Overseas Boston. Following jury trial, a defense verdict was rendered. De Los Santos appeals, challenging the trial court's ruling on an *in limine* motion, the rejection of a proposed instruction, and the refusal to permit testimony of a plaintiff's marine expert on rebuttal.

Trial testimony revealed that De Los Santos was sailing aboard the Overseas Boston on April 14, 1992, when he suffered back injury in the course of performing his duties. Chief Mate Eric Wilson decided that an unused stateroom should be converted into a repair room for deck equipment. He gave orders to Boatswain Stephen R.

Garay to have the room cleaned and prepared for that purpose. On the evening of April 14, 1992. When Boatswain Garay asked whether any of the seamen wanted to work overtime, De Los Santos was the only seaman to respond affirmatively. The job was completely voluntary, De Los Santos was doing it so that he could work overtime that night. Garay assigned him the job of moving approximately 16 four- by eight-foot panels secured to a doorway by a C-clamp. Garay asked De Los Santos to move the panels from the unused stateroom seven or eight steps down the corridor to another room. Garay told De Los Santos that if he needed him, he would be on deck, only seconds away. As De Los Santos loosened the C-clamp with his right hand, he pushed the panels upright with his left hand. During the three to five seconds in which he was opening the clamp screw, De Los Santos felt the pressure of the panels "wanting to fall down." Yet, he continued to loosen the clamp, while standing in the path of the panels should they fall down. De Los Santos did not know why he did not stop loosening the clamp when he felt the pressure of the panels' weight. The C-clamp came off and the panels fell on his sides and back.

De Los Santos was 34 years old and in good health prior to the accident. He had a college degree in marine transportation from his native country, the Philippines. He also had a license as an officer in the Philippine merchant marine. He had sailed since 1980, first on foreign flag ships and then in 1990 on American flag ships. At the time of the accident he was sailing as an able-bodied seaman with deck maintenance duties. Chief Mate

Eric Wilson and Boatswain Garay both considered him a knowledgeable and capable worker.

De Los Santos had some experience with these panels as a week to 10 days before the accident, he and another seaman had moved the panels, which were lying on the floor, to a position against the wall. Someone other than De Los Santos had placed the C-clamp on the panels.

From his prior experience with these panels, De Los Santos thought moving them was a two-man job. However, when he was informed by Boatswain Garay that another man would not be working with him on overtime, De Los Santos thought he could handle the job alone. His plan was to slide the panels one at a time to the new location.

De Los Santos's liability expert, Albert Milani, a marine engineer, testified that the job of moving these panels could not be done safely by one man as the C-clamp would pop off as the screw was loosened. One person would be unable to hold the panels upright. However, Milani conceded De Los Santos was in the best position to know whether this was a one-man or two-man job, and assess the safest way to do it. Milani also testified that whichever way De Los Santos decided to do the job, he should have stood out of the way of the panels in case they fell.

Witness gave conflicting testimony as to their estimations of the panels' weight and thickness. The testimony was not based on exact measurements of the panels as all but one of them were disposed of at sea six months after the accident. The remaining panel had been installed on the ship.

De Los Santos also introduced testimony attempting to show that the size of the C-clamp used was inadequate to keep the panels intact while attempting to unscrew the clamp to remove a panel. Hutchison testified the 10-inch-long, 4-inch-deep C-clamp popped off when he and Lopez removed a panel prior to the accident. The two men kept control of the panels by holding them. He told Boatswain Garay that the C-clamp was not deep enough. Lopez also testified that when he removed a panel prior to the accident he observed that the stationery end of the C-clamp was attached to the door stop and not around the door jamb as described by Garay.

Chief Mate Wilson as well as Boatswain Garay testified that the task of moving the panels was a one-man job. Chief Mate Wilson stated the proper way to loosen the clamp was to have untensioned it easily, checking the pressure and the manner in which it was secured. If it was loose, the chief mate would have eased the clamp off, freeing only one or two panels and then resecuring the clamp. In any event Chief Mate Wilson would have stood in the doorway to the bathroom, out of the way of the falling panels. Boatswain Garay testified that he would also have loosened the clamp allowing only one panel to be released. He would not have removed the C-clamp. By standing out of the way of the panels, even if Garay lost control of the panel he would not have been in danger of being injured. Both the boatswain and the chief mate testified that assistance was available to De Los Santos upon request from either of them.

Defense expert, Kirk Greiner, a retired Coast Guard Captain, opined that De Los Santos was careless in

removing the C-clamp. Based on De Los Santos's deposition testimony that he felt the force of the panels' weight against the C-clamp, Greiner testified that De Los Santos had ample warning of the possible danger from the falling panels if he removed the C-clamp. If Greiner was to do the job of moving these panels, he too would have started loosening the clamp to see the action of the panels and feel the weight of the panels against the clamp. If there was a great deal of force on the C-clamp, he would have either asked for assistance or allowed the panels to fall to the deck.

DISCUSSION

It must be remembered that we are not dealing here with a ruling by the trial court on a demurrer or motion for summary judgment. As a verdict was rendered in this case by the trier of fact we must view the evidence in the light most favorable to the prevailing party.

Cambridge moved *in limine* that the jury be instructed a statement by De Los Santos's counsel, during Garay's deposition, constituted an admission of fact. In the alternative, Cambridge sought to introduce the question and answer into evidence and allow the jury to determine whether a fact had been admitted. The question came up on the following context. At deposition, Thomas Boyle, De Los Santos's counsel, asked several questions attempting to show Garay's bias in favor of Cambridge and against De Los Santos. Boyle asked with whom Garay had discussed the case, when and the number of times he had discussed it with Warren Wilson, Cambridge's counsel, whether he had discussed the case

with Wilson today, whether they had discussed specific questions and answers. Boyle next asked whether Garay recalled a telephone call from him. "You said you wouldn't discuss this case with me. Why was that?" Boyle then asked: "Is there any particular reason why you chose to discuss it with Mr. Wilson privately off the video?" Garay responded: "No. No reason against Mani [De Los Santos] or his claim, if that's what you are intimating." Boyle stated: "I'm not intimating anything. I'm trying to find out what your reason is if there is any." Garay answered: "Okay. My reason is that Mr. Wilson said that the gist of your case would be that I was at fault for Mani being hurt. [¶] Well, Mani was hurt, but I don't feel that I was at fault for his being hurt. I feel that his own mistake caused his injury." Boyle then asked: "Do you remember I told you on the phone that that wasn't Mr. De Los Santos's claim that you were at fault?" Garay responded: "Well that's what you said, that I might not be aware of all the facts in the case. [¶] And I said, 'Well, when I come to the deposition, then you can ask me the questions, and I'll answer them there.' "

The trial court declined to instruct the jury that an admission of fact was made. Instead, it allowed the evidence to be introduced during Wilson's examination of Garay to let the jury determine whether an admission of fact had been made. Counsel asked: "Did Mr. Boyle state to you that it wasn't Mr. De Los Santos' claim that you were at fault?" Garay answered: "yes, he did, over the telephone." On cross-examination De Los Santos's counsel elicited from Garay that he did not believe himself to be at fault for numerous conditions on board the vessel, including reduced manning levels, the type of C-clamp

used, etcetera. Garay acknowledged that he appeared at the deposition because he believed the gist of the case was that he was to blame.

De Los Santos argues the trial court erred in admitting the question and answer as an evidentiary admission. We find no error in the trial court's exercise of discretion.

An attorney's authority to bind his or her client is premised on principles of agency law. "[T]he client as principal is bound by the acts of the attorney-agent within the scope of his actual authority (express or implied), or his apparent, or ostensible, authority. [Citation.]" (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 549.)

Statements of counsel made prior to trial or during argument can constitute an admission where the trial court finds it was reasonably intended to be an admission or reasonably construed by the other side as an admission. (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 734, citing *Bell v. Staacke* (1911) 159 Cal. 193 and *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550.)

The California Supreme Court in *Bell* affirmed the admission into evidence of a letter from appellant's counsel to respondent's counsel in response to a notice of motion. The letter, containing the statement "there was no defense to the motion," was admitted "as an admission of the attorney of record of the appellant made while he was such attorney." (*Bell v. Staacke, supra,* 159 Cal. at pp. 196-197.) In *Scafidi,* the Court of Appeal found a statement by plaintiff's counsel during trial constituted

an admission which eliminated a critical factual allegation to the fraudulent concealment cause of action. (*Scafidi v. Western Loan & Bldg., Co., supra,* 72 Cal.App.2d at p. 561.) The *Scafidi* court noted however, that the rule allowing courts to act upon facts admitted by counsel "should not be given application with respect to admissions which are improvidently or unguardedly made, or which are in any degree ambiguous." (*Id.,* at p. 562.)

In contrast, in *Zelayeta,* no error was found in the refusal to admit counsel's affidavit filed with a motion to produce records. The affidavit contained the recitation that the attorney was familiar with the facts set forth therein and then requested several documents, including a copy of the name and address of appellant's employee, a bus driver, who "arrived at the scene of the accident" at the time of the accident. Appellant contended this description amounted to an admission that the bus driver witness was actually at the scene, a contested point at trial. The trial court found the incidental statement was neither intended to have effect as an admission, nor could appellants have reasonably assumed it was intended as such. (*Zelayeta v. Pacific Greyhound Lines, supra,* 104 Cal.App.2d at pp. 732-733.)

Similarly, the Court of Appeal in *Coats v. General Motors Corp.* (1934) 3 Cal.App.2d 340, found counsel's statement during deposition did not constitute an admission of appellant General Motors' good faith. The plaintiff, a former general Motors employee, claimed entitlement to company stock as a bonus even though he was fired. In deposing a General Motors' officer, plaintiff's counsel asked whether the decision to give stock to a fired employee was determined by "the arbitrary will of

the executive committee." When the witness took exception to the word " 'arbitrary,' " counsel stated: " 'There is no desire to impute that to you. . . . ' " The *Coats* court reasoned: "Mere incidental or ambiguous statements by counsel will not bind or be admissible against the client where there is no such formality in the making of the statements as to indicate an intention that they should be taken as admissions. Obviously such was not the purpose here, and the remark lacked the force or effect of an admission. [Citations.]" (*Coats v. General Motors Corp., supra,* 3 Cal.App.2d at pp. 350-351.)

Counsel's statement here, that De Los Santos did not claim Boatswain Garay was at fault, was a deliberate, unambiguous admission. It was plainly not an incidental statement. As De Los Santos's attorney, Boyle was authorized to make the statement as to his client's contention of whether or not his supervisor was at fault. No error occurred in admitting this evidence.

The second argument raised by De Los Santos is the trial court erred in refusing to instruct the jury in accordance with his proposed unseaworthiness instruction as follows: "An unseaworthy condition may result from the lack of an adequate crew, *the lack of adequate manpower to perform a particular task* on the ship, or an improper use of otherwise seaworthy equipment." (3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions (4th ed. 1987) § 95.11, p. 644, emphasis added.) Instead, the trial court provided the unseaworthiness instruction proffered by Cambridge, as quoted from section 9.02.02 of the Ninth Circuit's Manual of Model Civil Jury Instructions (1993 ed.): "A vessel is unseaworthy if the vessel or any of its parts of equipment is not reasonably fit for its

intended purpose, or if its crew is not reasonably adequate or competent to perform the work assigned." The trial court reasoned the two instructions stated the same concept but that Cambridge's instruction was "cleaner" than that proposed by De Los Santos[1]. De Los Santos

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[1] The instruction proposed by De Los Santos in its entirety read as follows: "The plaintiff (also) claims that he suffered injury while a member of a crew of a vessel because of the unseaworthiness of the vessel and that he is entitled to damages as a result. [¶] Under the maritime law, every shipowner or operator owes to every member of the crew employed aboard the vessel the non-delegable duty to keep and maintain the ship, and all decks and passageways, appliances, gear, tools and equipment of the vessel, in a seaworthy condition at all times. [¶] To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used, for the purpose or use for which provided or intended. An unseaworthy condition may result from the lack of an adequate crew, the lack of adequate manpower to perform a particular task on the ship, or an improper use of otherwise seaworthy equipment. [¶] Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner or operator is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances, and may have had no notice of knowledge of the unseaworthy condition which proximately caused the injury or damage." (3 Devitt, Blackmar & Wolff, Federal Jury Practice and Instructions, *supra*, § 95.11, pp. 643-644.)

The unseaworthiness instruction delivered stated: "A vessel owner has a duty to provide and maintain a seaworthy vessel. That duty cannot be turned over to anyone else, [¶] A vessel is seaworthy if a vessel and all of its parts and equipment are reasonably fit for its intended purpose and it is operated by a crew reasonably adequate and competent for the work assigned. [¶] A vessel is unseaworthy if the vessel or any of its

argues that his proposed instruction communicated more clearly the concept that an unseaworthy condition can result from lack of adequate manpower to perform a particular task.

It is well established that a party is not entitled to have the jury instructed in any particular language so long as the instructions given are a correct statement of the law. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80; *Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3d 195, 209; *Hom v. Clark* (1963) 221 Cal.App.2d 622, 643.) When an appellant's proposed instruction is not materially different than those given, there is no error in refusing the proposed instruction. (*Hom v. Clark, supra,* 221 Cal.App.2d at p. 643.) In our view, there is a high degree of similarity between the two instructions on the point in question. The instruction provided correctly informed the jury that a vessel with a crew not reasonably adequate for the assigned work was unseaworthy. (See *Waldron v. Moore-McCormack Lines* (1967) 386 U.S. 724, 727.) No error occurred in the rejection of De Los Santos's proffered unseaworthiness instruction.

De Los Santos's final argument is that the trial court's refusal to permit his liability expert, Milani, to testify on rebuttal constituted error[2]. He contends that the question

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parts or equipment is not reasonably fit for its intended purposes, or if its crew is not reasonably adequate or competent to perform the work assigned."

[2] While De Los Santos has not cited and the reporter's transcript does not reveal the trial court's ruling denying Milani's rebuttal testimony, Cambridge does not contest the point. Further, that this ruling was made is evidenced by the

of whether the C-clamp was affixed to the door jamb or the door stop, which was closer to the panels, only became apparent after the testimony of defense expert Greiner. Greiner presented a scale model of the C-clamp attached to the door jamb, based on a four-inch-thick door jamb. The model also included a door stop or ledge which De Los Santos claims was included but misrepresented in diagrams drawn by Garay. De Los Santos submits Milani would have explained the panels must have been at least three-eighths inch think, and the even if the clamp were 10 inches wide it would not have fit around the panels and the door jamb. If it was affixed only to the door stop, as he proposes Milani would have testified on rebuttal, an unsafe condition was created.

Whether or not to allow rebuttal testimony is a matter within the trial court's discretion. (Code Civ. Proc, § 607, subd. 6; *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 604; *Ray v. Jackson* (1963) 219 Cal.App.2d 445, 454.) We find no abuse of that discretion in the refusal to allow Milani to testify on rebuttal.

First, contrary to De Los Santos's contention, the question of C-clamp location was not first presented by Cambridge's expert witness. Several of De Los Santos's own witnesses testified during his case in chief as to the size, dimensions and location of the C-clamp. One witness, Lopez, testified that when he helped move one panel prior to the accident, he observed the C-clamp

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inclusion of this exercise of discretion by De Los Santos as one of his grounds for new trial.

affixed to the door stop and not the door jamb. Although Milani testified before Lopez, presumably De Los Santos's counsel knew the gist of his own witness's testimony and could have questioned his own expert about the possible unsafe condition this created. Moreover, De Los Santos testified on rebuttal that the C-clamp most have been on the door stop and not the door jamb. He explained that his deposition testimony, in which he testified the clamp was on the door jamb, had been based on a drawing in which the door stop was not visible.

Further, De Los Santos's suggestion that the "true significance of [the measurement of the panel] was not apparent until Capt. Greiner's model came into evidence" is belied by the record. Throughout his case-in-chief, De Los Santos's lay witnesses and expert witness testified as to their estimations of the panels' dimensions.

The judgement is affirmed.

Merrill, J.

We concur:

Chin, P.J.

Corrigan, J.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

MANOLO DE LOS SANTOS, Plaintiff, vs. CAMBRIDGE TANKERS, INC. Defendant.	NO. 948402 JUDGMENT ON JURY VERDICT (Filed June 2, 1994)

This action came on regularly for trial on May 16, 1994 in Department 20 of the Superior Court, the Hon. John Dearman presiding; the plaintiff appearing by attorney Thomas Boyle and the defendant appearing by attorney Warren Wilson.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its special verdict (attached) as follows:

"Was defendant negligent? No."

"Was the OVERSEAS BOSTON unseaworthy? No."

It appearing by reason of said verdict that defendant Cambridge Tankers, Inc. is entitled to judgment against plaintiff Manolo De Los Santos;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff Manolo De Los Santos

take nothing from defendant Cambridge Tankers, Inc. and that judgment is entered in favor of defendant Cambridge Tankers, Inc. and against plaintiff Manolo De Los Santos together with its costs in the amount of $7,181.27.

Dated: JUNE - 1 1994

JOHN DEARMAN
Judge of the
Superior Court

First Appellate District, Division Three,
No. A067154 S049805

IN THE SUPREME COURT OF CALIFORNIA

MANOLO DE LOS SANTOS, Appellant

v.

CAMBRIDGE TANKERS INCORPORATED, Respondent

(Filed Dec. 20, 1995)

Appellant's petition for review DENIED.

LUCAS
Chief Justice

(2)

No. 95-1522

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MANOLO DE LOS SANTOS,

Petitioner,

vs.

CAMBRIDGE TANKERS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Can the plaintiff in a personal injury action brought pursuant to the Jones Act, 46 U.S.C. § 688, compel the court to instruct the jury on a definition of unseaworthiness using particular language chosen by plaintiff's counsel?

STATEMENT OF INTERESTED PARTIES

Respondent, Cambridge Tankers, Inc. is related to Overseas Ship Holding Group, Inc.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Supreme Court Rules, Respondent submits the following Statement of the Case to correct omissions and misstatements in the Petition for Certiorari.

Petitioner was injured while working aboard the M/V OVERSEAS BOSTON. At the time of the accident Petitioner was preparing to move several 4'x8' wall panels. The panels fell on Petitioner when he loosened a clamp which held them against a bulkhead while standing directly in front of the panels. Petitioner contended, *inter alia*, that Respondent should have assigned more men to the job of moving the panels. Respondent introduced evidence that the accident was the result of Petitioner's own negligence and that Petitioner's supervisor was available to provide assistance if needed. Petitioner never requested any assistance.

Petitioner's theory that the vessel was unseaworthy because too few crew members were assigned to the task of moving the panels was presented to the jury both in closing arguments and in the instructions. In his closing arguments Petitioner's counsel told the jury that "If it takes two men to hold these panels up when they get unbalanced and there's only one there the ship is liable for lack of manpower."

Petitioner's counsel also argued that the court should give the pattern instruction on unseaworthiness suggested by 3 *Devitt, Blackmar and Wolff* § 95.11. Respondent requested that the trial court give the unseaworthiness instruction approved by the Ninth Circuit. *Manual of Model Civil Jury Instructions for the Ninth Circuit*, 1993 Edition § 9.02.02. The two instructions are best compared side by side. They read as follows:

Devitt, Blackmar & Wolff	Ninth Circuit Pattern Instruction
An unseaworthy condition may result from the lack of an adequate crew, the lack of adequate manpower to perform a particular task on the ship, or an improper use of otherwise seaworthy equipment.	A vessel is unseaworthy if the vessel, or any of its parts or equipment, is not reasonably fit for its intended purpose or if its crew is not reasonably adequate or competent to perform the work assigned.

The trial court believed that the two instructions were very similar, but that the Ninth Circuit instruction was clearer. The Court of Appeals likewise held that the two proposed instructions bear "a high degree of similarity." Petitioner's counsel never requested that the trial court use the instruction approved by the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The petition for certiorari is frivolous because it is based solely on Petitioner's preference for the wording of one jury instruction over another similar instruction. The instruction given by the trial court, which was taken from the Ninth Circuit's *Manual of Civil Jury Instructions*, clearly conveyed the concept that insufficient manpower for a particular task may constitute unseaworthiness in the context of a seaman's personal injury action. This concept, which was embraced by this Court in *Waldron v. Moore-McCormick Lines*, 386 U.S. 724 (1967), has become a commonplace in maritime law. There is no conflict among the circuits. Petitioner feels that the instruction he

proposed was a better expression of the concept than the Ninth Circuit pattern instruction. Both the trial court and the Court of Appeals found that the Ninth Circuit's instruction was better. In any event, Petitioner was not entitled to an instruction in particular words of his own choosing but only to a legally correct instruction, which was unquestionably what he got. Petitioner raises no important issue of federal law but is merely asking this Court to intervene in the fine tuning of a jury instruction concerning a well-settled point of law.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE CALIFORNIA COURT OF APPEALS AND ANY FEDERAL COURT.

Petitioner argues that the Ninth Circuit pattern jury instruction conflicts with the Supreme Court's holding in *Waldron v. Moore-McCormack Lines,* 386 U.S. 724 (1967) and the Fifth Circuit's pattern jury instruction on unseaworthiness. It does not.

Waldron v. Moore-McCormack Lines, 386 U.S. 724, 727 (1967) holds that a vessel may be unseaworthy if "too few men" are assigned "when and where" the job is to be done. *Waldron* did not hold that this theory must be contained in any particular wording. Both the *Devitt, Blackmar & Wolff* and the Ninth Circuit instructions convey the theory of unseaworthiness identified in *Waldron*. The California Court of Appeals held, citing *Waldron,* that the Ninth Circuit pattern instruction "correctly informed the jury that a vessel with a crew not reasonably adequate for the assigned work was unseaworthy." (Appendix at 11).

Petitioner's discussion of the Fifth Circuit pattern

instruction is irrelevant because Petitioner did not request that it be given and because the instruction given is consistent with *Waldron*.

III.

THE PETITION DOES NOT RAISE AN IMPORTANT AND UNRESOLVED ISSUE OF LAW.

The Supreme Court's holding in *Waldron v. Moore-McCormack Lines*, 386 U.S. 724 (1967) resolved the question of whether a vessel can be unseaworthy if too few crew members are assigned to a particular task. The Ninth Circuit pattern jury instruction accurately conveys this theory of liability to the jury. Petitioner's real complaint is not with whether the jury was properly instructed, but rather that they be instructed in particular words of his own choosing. The precise wording of jury instructions is not an important question for the Supreme Court to decide. It has long been settled that under federal law a party is not entitled to have the jury instructed in any particular language so long as the instructions given are a correct statement of the law. *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987); *United States v. Hayes*, 794 F.2d 1348, 1350-1351 (9th Cir. 1986); *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 530 (8th Cir. 1984).

CONCLUSION

The Petition should be denied because the instruction given was correct and adequately conveyed the concept of unseaworthiness set forth by this Court in *Waldron*. Petitioner's preference for different wording is not worthy of this Court's attention.

Respectfully submitted,

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(3)

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MANOLO DE LOS SANTOS,

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v.

CAMBRIDGE TANKERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a conflict in the precise wording of the Circuit Pattern Instructions on the definition of unseaworthiness an important question for this Court to decide?

REPLY TO BRIEF IN OPPOSITION

REASON FOR REPLY

Respondent's Opposition relies upon a federal judge's discretion to select the particular language of an instruction as grounds for the omission of a theory of liability made by a state court judge applying federal law. Petitioner deems this a new point within the meaning of Supreme Court Rule 15.6 and replies to it herein.

Respondent also argues that the precise wording of jury instructions on unseaworthiness is not an important issue for this Court to decide. This, too, is a new point to be addressed by this reply.

ARGUMENT

1. Respondent confuses the discretion vested in trial judges to " . . . frame the form and language . . . " of jury instructions in both civil (see *Ferrer v. Richards Mfg. Co.*, 733 F.2d 526, 530 (8th Cir. 1984) (Opp. 4)) and criminal (see *United States v. Hayes*, 794 F.2d 1348, 1350-1351 (9th Cir. 1986) and *United States v. Goldblatt*, 813 F.2d 619, 623 (3d Cir. 1987) (Opp.4)) cases with the fundamental entitlement of every litigant " . . . to a jury instruction on a . . . theory if the theory has a basis in law and in the record". *Hayes, supra.*

This entitlement makes it " . . . the duty of a trial court in any jury trial is to give instructions which are meaningful, not in terms of some abstract case, but which can be understood and given effect by the jury once it

resolves the issues of fact which are in dispute." *Structural Rubber Products v. Park Rubber*, 749 F.2d 707, 723 text accompanying fn. 15 (D.C. Cir. 1984), citing 9 *Wright and Miller Federal Practice and Procedure* § 2556 at 659-60 fn. 3 (1971), updated in 1995 at pages 438-450 of Volume 9A, collecting cases that show the distinction between form and substance in jury instructions.

"Instructions should guide the jury's deliberations and are not mere technicalities in our legal system." *Houston v. Dutton*, 50 F.3d 381, 385-386 and fn. 1 (6th Cir. 1995) citing *O'Neal v. McAnich*, ___ U.S. ___,115 S.Ct 992, 996-997 (1995) which also shows that the precise wording of jury instructions is, indeed, an important question for this Court to decide, contrary to respondent's argument in this regard (Opp. 4). See also, *Friedman, Failed Enterprise: The Supreme Court's Habeus Reform*, 83 Calif. L. Rev. 485, 498 and fn. 80 (1995) and *Peck v. United States*, 73 F.3d 1220, 1228 and fn. 8 (2d Cir. 1995) both analyzing the role of instructional error in the decisions of this Court.

2. Moreover, an important issue is also presented to this Court when it involves ". . . . a subtle erosion of a statutory or legal principle . . . " such as the concept of unseaworthiness by reason of inadequate manpower. *Stern, Gressman, Shapiro and Geller, Supreme Court Practice* (7th Ed. 1993), 194 quoted text accompanying fn. 56; 190 text accompanying fn. 48, discussing the propensity of this Court to grant certiorari when lower courts have frustrated the congressional policy that juries determine liability in Seaman's and F.E.L.A. cases shown by *Wilkenson v. McCarthy*, 336 U.S. 53, 69 (1949), concurring opinion of Justice Douglas. See also, *Note, Supreme Court Certiorari Policy in Cases Arising Under the F.E.L.A.*, 69 *Harv. L. Rev.*

1441 (1956) where fn. 7 observes that the jury trial issues presented by F.E.L.A. cases are the same as those presented by the Jones Act in seaman's cases.

CONCLUSION IN REPLY

The petition should be granted for the additional reason that the conflict on the definition of unseaworthiness by reason of inadequate manpower between the Ninth Circuit and the Fifth Circuit Pattern Instructions as well as the settled teachings of this Court on the concept of unseaworthiness involves a subtle erosion of an essential legal principle of federal substantive law designed to protect the rights of seamen.

Respectfully submitted,

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